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THE SELLER'S ACTION FOR THE PRICE.

WHEN a contract of sale has been broken by the buyer, before title has passed according to the usual rules of presumption, there arises the very practical question whether the seller can sue him for the purchase price, as such, or is limited to a suit for damages only. In the latter case his damage may happen to equal the purchase price, but it is usually considerably less than that amount. If the seller can recover the purchase price, as such, it must be because that price is legally due him as a consequence of the contract. The ultimate inquiry is, therefore, whether the buyer's promise to pay the purchase price, of itself creates an enforcible obligation to pay it; or, if the promise itself does not do so, whether the seller can create such obligation by further action on his own part alone. The cases actually arising out of contracts of sale are in conflict, and it is, therefore, of more than academic value to examine the background and analogies of the matter.

If there be, as a result of the buyer's promise, an enforcible liability to pay the agreed price, it must be either an anomalous liability, or a form of the old liability for a debt. There seems to be nothing in the historical development of the latter liability, however, to warrant assumption that a debt arises out of the mere promise, even though on consideration, to pay. For the sake of clarity, it may be noted that "legal liability" as here used means liability enforced by the courts so directly as practicable, and not that moral obligation to perform a contract according to its terms, sometimes said to arise out of every contract regardless of the legal remedy. In reference to the historical development of liability in debt, research writers are agreed that no debt was created by a mere promise to pay money. A *quid pro quo,* distinct from a mere reciprocal promise, was essential. Thus, says *Ames,* "as to debt on simple contract, it is a rule without exception in modern times that the debt must be founded on a *quid pro quo.*" "The *quid pro quo* which

the debtor must receive to create his duty might consist of anything that the law could regard as a substantial benefit to him. * * * But debt will not lie upon mutual promises."[1] And again, in tracing the right of the parties to a contract of sale to bring reciprocal actions for detinue and debt, he shows that the remedies came to exist without transfer of possession of either the chattel or the money, and without reciprocal exchange of anything tangible. He adds, however, that "the right of the buyer to maintain Detinue, and the corresponding right of the seller to sue in Debt were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants—each party's grant of a right forming the *quid pro quo* for the corresponding duty of of the other."[2]

"Debt, then, we may say, lies to recover money or chattels due and made certain in amount by contract, by custom, or by record. In this definition the term 'contract' has a technical meaning which is not so broad as that now commonly attached to it. The term here means such a contract as was sufficient at common law to create a debt. Accordingly it must be either a simple contract in which a *quid pro quo* passes to the debtor at the time the debt is created, or it must be a contract in the form of a specialty. Negatively, the contract which creates a debt is not the simple promise upon which alone the action of assumpsit will lie, as where mutual promises are given * * *."[3] "Neither debt nor detinue ever became completely proprietary or delictual or completely contractual. The fact was never lost sight of that the action of debt was based upon mutual grants * * *."[4] It thus appears that, in the opinion of research writers, the same breadth of consideration that will permit an action of assumpsit on a promise, will not necessarily also create such an obligation as to permit the remedy of an action of debt. The *quid pro quo* necessary to the latter is narrower, and does not include a mere reciprocal promise; it must, rather, be a reciprocal grant or giving of something more materially valuable than a promise.[5]

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[1] Lectures on Legal History, p. 90.

[2] 8 Harvard Law Rev. 259.

[3] Street, Foundations of Legal Liability, Vol. III, p. 127.

[4] Holdsworth, Hist. of Eng. Law, Vol. III, p. 326.

[5] Pollock & Maitland, Hist. of Eng. Law, Vol. II, p. 210 ff. "We much doubt whether at the end of the 13th century the action extended beyond those cases in which the defendant had received some material thing or some service from the plaintiff." "It enters no one's head that a promise is the ground of this action." It is founded on a "*causa debendi*, and that cause will not be a promise."

Holdsworth, however, suggests this:—The promise of a seller later to convey gives, now that assumpsit has developed, a right of action in damages if he should fail. This is just as much a veritable right as is the right of action for failure to deliver a specific

Whether modern cases adhere to this historical limitation of the legal existence of a debt, is a conclusion founded on meagre evidence. Actual cases in which there has not been a real *quid pro quo* are rare, except those arising out of contracts of sale, and these are, as will be shown, in conflict.

In occasional cases one finds it said that "debt will lie on a simple contract,"[6] but there is no evidence, contextually, to indicate that the statement is intended to be precise, and inclusive of contracts arising out of mutual promises. It invariably arises in reference to some other point, such as that it is immaterial whether the contract is oral or written, or under seal. The usual cases in which the law imposes a duty to pay money—other than as the result of statue or of a grant—namely, those founded on the "common counts," do not, in the theory of their origin or in their actual decisions, bear upon the effect of mutual promises in creating a debt.

It is true that the promise evidenced by a bill of exchange or promissory note does create a liability in debt. But this, after all, is made consistent with the proposition that such a liability arises only out of a reciprocal grant, by the judicial fiction that these promises originated as a return for an actual *quid pro quo*. Thus in *Hard's Case*,[7] it was held that "*Indebitatus assumpsit* will lie in no case but where a debt lies, therefore it lies not upon a wager, nor upon a mutual assumpsit, nor against the acceptor of a bill of exchange; for his acceptance is but a collateral engagement. But it lies against the drawer himself, for he was really a debtor by the receipt of the money, and debt would lie against him." In *Rayborg* v. *Payton*[8] it was held that an action of debt could be brought by the indorsee of a bill of exchange against the acceptor, on the ground that "a duty to pay" was clearly established. The court founded this "duty," however, not on the promise, but on the assumption that "an acceptance is evidence of money had and received by the acceptor for the use of the holder." Likewise, in *Willmarth* v. *Crawford*,[9] an indorsee of a note was allowed to sue the maker by an *indebitatus* action because "the theory in relation to a promissory note is, that the drawer has received a sum of money from the

chattel belonging to the plaintiff. If a grant of the latter right will serve as a *quid pro quo* on which to assume a grant of the price, as a debt, by the buyer, why, now that the former exists in law, will it not also serve as *quid pro quo* on which to predicate the buyer's reciprocal grant of the price.

[6] *Morris* v. *School District*, 12 Me. 293.

[7] 1 Salk, 23; 91 Eng. Rep. 22, 169.

[8] 2 Wheaton 385. This decision was followed, without discussion, in *Kirkman* v. *Hamilton*, 6 Peters 20.

[9] 10 Wend. (N. Y.) 341.

payee and promises in consideration therefor, to repay it to him or to a person whom he may designate at a future day."

In *Bishop* v. *Young*[10] the payee of a promissory note was allowed to sue the maker in debt because the note had "an apparent consideration." The case does not indicate what was meant by that phrase; it might be as broad as the term consideration is usually held to be. So also, in *Dunlap* v. *Buckingham*,[11] it was said, "The law is well settled, that an action of debt may be maintained by the payee of a bill of exchange or a promissory note against the drawer or maker, when the instrument is expressed to be for value received, or purports to be founded on some consideration. * * * And the action of debt may also be supported by the payee against the drawer or maker, although no consideration be expressed on the face of the bill or note. The law implies that the instrument is based upon a good consideration. (Quoting from *Hatch* v. *Trayes*, 11 A. & E. 702) 'We are of the opinion that those words (value received) express only what the law must imply in each case, from the nature of the instrument and the relation of the parties apparent upon it; and that it therefore makes no difference, as to this question, whether they be or be not inserted.' " What this "apparent consideration" is, which the law will imply, is perhaps explained by the use of the same phrase in *Hodges* v. *Steward*,[12] "And in this case it was often times said, that an *indebitatus assumpsit* does not lie upon a bill of exchange, as it has been ruled in diverse cases, but against a drawer for value received there it would lie; but this is for the apparent consideration." This owing of a debt, therefore, by a party to a note or bill of exchange, is obviously based on the assumption that he has not only promised to pay, but has received in return for his promise something of more value than a mere counter promise.

In other cases the right of a promisee of money to sue in debt, without other consideration than his own counter promise, has been positively denied. And this denial may very plausibly be ascribed to the fact that a mere promise on consideration, but without *quid pro quo*, does not create a debt. In *International Text Book Co.* v. *Jones*,[13] for instance, the plaintiff had contracted to furnish defendant with text-books and lessons, in return for which defendant had promised to pay $50.40 on stated dates. Before the plaintiff had actually done anything by way of performance of his agreement, and

[10] 2 Bos. & Pul. 78, 128 Eng. Rep. 1160.
[11] 16 Ill. 109.
[12] Skinner, 346; 90 Eng. Rep. 154.
[13] 166 Mich. 86.

before title to anything had passed from him, defendant repudiated the contract. When the time set for payment arrived, plaintiff brought suit, not for damages, but for the whole sum promised, "on the claims that the contract contained an unqualified promise to pay certain installments at the stated times * * * and that, the time having elapsed within which all of the payments were to become due, the defendant is liable upon his promise, leaving plaintiff to perform its contract, which it is willing to do." The court refused to allow recovery of more than damages, saying, "The contract price is recoverable only on the theory of performance, never upon the theory of inability to perform." There is no discussion of the form of remedy. The case might possibly be said to stand upon the ground that while a debt arose by virtue of the reciprocal promises it could not be recovered by action, until performance of the plaintiff's condition precedent. The more reasonable and probable interpretation, however, is that no debt was created by the mutual promises.[14]

In another long series of cases,[15] the theory that a promise, without the *quid pro quo* necessary to make it a grant, does not create a legal debt, is supported by the fact that the promisee is not allowed to sue for the amount promised in case of the promisor's repudiation, but is limited to damages, even though he has been able to perform his own promise after the other party's repudiation. These cases are usually put, expressly or tacitly, upon the ground that the promisee may not increase the amount of his damage after breach, or repudiation, by the promisor. But, whatever the reason, the fact stands that the promisee, who has given only a counter promise as consideration, can not recover the specific amount promised, but is limited to recovery of damages, even though he is able and willing to perform the promise that he himself has given. A seller who has promised to pass title, but has not actually done so at the time of the buyer's repudiation, is in the same position as one who has not performed other consideration at the time of the repudiation. The analogy of the cases seems, therefore, to be precise.

This is the background and analogy of the legal right of a seller whose buyer has refused to accept title. While the authority is scant, and anything but definite in its expressed theory, the sum

[14] So also, *Wigent* v. *Marrs*, 130 Mich. 609; *Howard* v. *Daly*, 61 N. Y. 362, no right to sue for wages, on breach of contract of employment, but only for resulting damages; *Black* v. *Woodrow*, 39 Md. 194.

[15] *Unexcelled Fire-works Co.* v. *Polites*, 130 Pa. 536; *Funke* v. *Allen*, 54 Neb. 407; *Pittsburg, etc. R. R. Co.* v. *Aeck* 50 Ind. 303; *Dillon* v. *Anderson*, 43 N. Y. 231; *Gibbons* v. *Bente*, 51 Minn. 499; *Heiser* v. *Mears*, 120 N. C. 443; *Grand Rapids Furniture Co.* v. *Robinson*, 7 O. D. Rep. 388; See, "Repudiation of Contracts," 14 Harv. L. Rev. 423.

total of its implication is adverse to the right of such a seller to sue in debt for the purchase price.

This brings us to the actual decisions arising out of contracts of sale. A number of these hold directly that the seller can recover the whole amount promised, without having at any time passed title to the buyer. Most of these, however, are specifically predicated upon the fact that a real *quid pro quo,* distinct from the title or the promise to convey the title, has been received by the buyer in return for his grant of the sum named. By such findings the cases are brought wholly into harmony with the proposition that money becomes due under a promise to pay only if there has been something more in return for the promise than a mere counter promise. A frequently cited case of this type is *Burnley* v. *Tufts.*[16] Tufts had sold to Burnley a soda-water apparatus, with the express stipulation that title should not pass till the price had been paid, and that payments should be made at stated dates. It does not appear that there was any express agreement that Burnley should have possession of the apparatus during the time allowed for payment, but such was obviously the intent of the parties. The apparatus was destroyed by fire, while in Burnley's possession, although without his fault. Tufts sued for the purchase price, after the stated time for payment had passed, and was allowed to recover. The opinion clearly shows that the giving possession of the apparatus was taken by the court to be consideration for the promise to pay, and that this consideration had been executed. There was therefore a *quid pro quo,* in the sense of something of value received, for the buyer's grant of the price. "Burnley," said the court, "unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody and before the time for the payment of the last note due, on payment of which only his right to the legal title of the property would have accrued does not relieve him of payment of the price agreed upon. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay."[17]

[16] 66 Miss. 48.

[17] Accord, *White* v. *Solomon,* 164 Mass. 516; *Nat'l Cash Reg. Co.* v. *Hill* 136 N. C. 272; *Bierce* v. *Hutchins,* 205 U. S. 340; *Am. Soda-fountain Co.* v. *Vaughn,* 69 N. J. L.

Other cases are extremely vague as to whether they proceed upon the reasoning of *Tufts* v. *Burnley* or stand as authority for the proposition that the promise to pay, in consideration of a reciprocal promise, of itself creates a legal obligation to pay the stated amount. Thus, in *National Cash Register Co.* v. *Dehn*,[18] recovery of the purchase price was allowed, on the ground that "whether title passed or not is of no consequence, in determining plaintiff's right to sue for the entire amount to be paid * * * (It) does not depend upon the vesting of title in the defendants, but upon the promises of defendants contained in the contract." This in its context clearly indicates that the right to the money is without regard to executed consideration or *quid pro quo*, but the authority cited by the court is *White* v. *Solomon*,[19] which was decided expressly on the ground that there was an executed consideration on which to found the debt.[20]

A few cases, however, do allow recovery of the agreed price, without any pretense of an executed consideration or *quid pro quo*, simply on the ground of the promise to pay.[21]

In actions on contracts for the sale of real estate, suit for the purchase price, as a debt, seems to be allowed, at least when payment of the price is precedent to the passing of title. So long ago as *Pordage* v. *Cole*,[22] a vendor of land was allowed to sue in debt for the agreed price, payable on fixed dates, before title had passed. A note following the case practically repeats *Thorpe* v. *Thorpe*,[23] to the effect that, "If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy, and intended not to make the performance a condition precedent." But these cases

582, "What was the consideration of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus with the right to acquire title, was the consideration the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus with the right to acquire title." *Harley* v. *Stanley*, 25 Okla. 89; *Lavalley* v. *Ravenna*, 78 Vt. 152; et. al.

[18] 139 Mich. 406.

[19] 164 Mass. 516.

[20] *Kilmer* v. *Moneyweight Scale Co.* 36 Ind. Ap. 568, "The buyers were absolutely bound to pay the purchase price" * * * "they were bound by their lawful contract according to its terms." "In such a contract of sale, the possession and use to be in the buyer, the title to remain in the seller until full payment, there is a sufficient consideration for the absolute promise to pay the agreed price."

[21] *Appleton* v. *Norwalk Library Co.*, 53 Conn. 4; *Beach's Appeal*, 58 Conn. 464, suit was on the promissory note; *Jaeggli* v. *Phears*, 30 Tex. Civ. Ap. 212; *Gray* v. *Booth*, 71 N. Y. S. 1015; *Cambridge Soc.* v. *Elliott*, 98 N. Y. S. 232; *Krebs Hop. Co.* v. *Livesley*, 51 Ore. 527, *semble*; *Dederick* v. *Wolfe*, 68 Miss. 500, suit on promissory note.

[22] 1 Saund. 320; 85 Eng. Rep. 449.

[23] 1 Salk, 171; 91 Eng. Rep. 157.

were, after all, as said in *Pordage* v. *Cole,* actions of "debt upon a specialty." It might well have been the seal which gave rise to the debt, and not the simple promise. However there was no seal upon the contract in the recent case of *Lookabaugh* v. *Gourley.*[24] The vendor was permitted to sue for the full amount of installments due. The only point discussed by the court was whether tender of a conveyance was a condition precedent. Acceptance of title by the vendee seems not to have been even considered as a possible essential to the recovery sought.

If, on the basis of the foregoing discussion, it be assumed that a seller who has not passed the title can not sue for the purchase price itself, the question is raised whether he can convert the buyer's promise into a grant of the price, by thrusting title upon him against his will. Such a result would, of course, be utterly illogical, and the buyer's "grant" would be only a fiction of the law. But the inquiry is, here, rather what the law is, than what it logically ought to be. There is a great deal of *dictum* to the effect that the seller may thus thrust title upon the buyer and sue him for the price. This is usually stated in the form of a persistent quotation that "The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price, (2) * * *." This statement was originally formulated in *Dustan* v. *McAndrew,*[25] and is one of the most widely quoted pieces of mere unnecessary *dictum* to be found in the law. That case was not itself a suit for the purchase price, but was an action for damages only, and the statement in regard to suit for the price was only *dicta.* Of the two cases cited in *Duston* v. *McAndrew* as authority for the statement, one was itself an action for damages only, and in the other title had clearly passed, in accord with the usual rules of presumption, before the buyer's breach.

The subsequent quotations of this so-called rule have themselves, for the most part, been *dictum.* In many of the cases repeating it, title had passed to the buyer according to the usual rules.[26] In most of them action was really for damages only.[27] The statement has, however, been actually followed in a number of cases.[28]

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[24] (Okla. 1918) 171 Pac. 464.

[25] 44 N.Y. 72.

[26] *Ames* v. *Moir,* 130 Ill. 582; *Meagher* v. *Cowing,* 149 Mich. 416;

[27] *Habeler* v. *Rogers,* 131 Fed. 43; *Kinkead* v. *Lynch,* 132 Fed. 692; *Krebs Hop. Co.* v. *Livesley,* 59 Ore. 574; *Range Co.* v. *Merchantile Co.* 120 Mo. Ap. 438; *Van Brocklen* v. *Smeallie,* 140 N. Y. 70; *Comstock* v. *Price,* 103 Ill. Ap. 19; *Magnes* v. *Sioux City Co.,*

In cases of conditional sale, where the promise is to pay before title passes, there seems to be a general tendency to hold that the seller may elect to treat the title as being in the buyer and sue for the price. These however are not necessarily in conflict with the proposition that the seller may not thrust title upon an unwilling buyer, nor do they more appropriately support the proposition that he may so force it upon the buyer. They are cases in which the actual possession is already in the buyer. As we have seen a number of cases expressly say that this possession on the buyer's part is what creates his legal obligation to pay the price, regardless of title. Even if this were not the assumption, the breach in these cases is not a refusal to accept title and to pay for it, but a failure to make the payments conditional to the eventual passing of title. It may well be presumed that the buyer's continued possession of the goods is an acquiescence in the passing of title, if the seller is willing to waive the condition precedent, and, in consequence, a tacit grant of the right to the price.[29] There is nothing in the decisions to negative this, and the idea is clearly supported by the fact that, as a general rule, a conditional vendor who has repossessed himself of the goods is not thereafter allowed to sue for the price.[30]

A case frequently said to support the theory that a seller can sue despite the buyer's refusal to receive the title is *Bement* v. *Smith*.[31] In this case the plaintiff had agreed to make a carriage for the defendant who promised to pay therefor a certain sum. When the carriage was completed, the maker offered it to the defendant who refused to accept it. The maker then brought suit for the whole

14 Colo. Ap. 219; *Trunkey* v. *Hedstrum*, 131 Ill. 204, in which the *buyer* was plaintiff, asking damages for seller's failure to deliver; *Mowry* v. *Kirk*, 5 O. D. Rep. 594, digested as authority that seller may sue for price, although the action was by the buyer; *Cullen* v. *Bimm*, 7 O. D. Rep. 388, action under the code, and seller's right to sue for price stated as a rule, although the court specifically said the amount actually awarded was *damages; Moline Scale Co.* v. *Breed*, 52 Iowa 307, statement that an action for the price *would have been* allowed if the seller's failure to tender possession had not precluded it.

[28] *Crown Vinegar Co.* v. *Wehrs*, 59 Mo. Ap. 493; *Walker* v. *Nixon*, 65 Mo. Ap. 326; *Walker Bros.* v. *Daggett*, (Miss. 1917) 76 So. 569; *Osgood* v. *Skinner*, 211 Ill. 229; *Rastetter* v. *Reynolds*, 160 Ind. 133; *McCormick Co.* v. *Markert*, 107 Iowa 340; *Busch* v. *Stromberg Co.*, 226 Fed. 200. In some states this alternative has been settled by statute, e. g. So. Dakota, Comp. Laws, § 3589; Oklahoma, Civ. Code, § 3551.

[29] *Frisch* v. *Wells*, 200 Mass. 429; *Smith* v. *Aldrich*, 180 Mass. 367; *Bond* v. *Bourk*, 54 Colo. 51; *Crompton* v. *Beach*, 62 Conn. 25; *Turk* v. *Carnaham*, 25 Ind. Ap. 125; *Osborne* v. *Walther*, 12 Okla. 20; *Shepard* v. *Mills*, 173 Ill. 223.

[30] *Alexander* v. *Mobile Auto Co.*, 76 So. 944; *Jones* v. *Bank of Commerce*, 199 S. W. 103.

[31] 15 Wend. 493 Cf., as in accord with this case, *Shawhan* v. *Van Nest*, 25 O. S. 190. But *Nixon* v. *Nixon*, 21 O. S. 114, was a sale of logs, title not passed; suit under code, on buyer's refusal to receive the logs; held, measure of damage was difference between contract price and market value.

sum promised, on counts for work and labor performed and for goods sold. To avoid the *Statute* of *Frauds,* the court held that it was not necessary to have declared for goods bargained and sold, and that the plaintiff could recover as for work and labor performed. There was, therefore, a real *quid pro quo* for the debt, in the way of services performed for the defendant, *if* it may fairly be said that the services, performed on materials which were not the defendant's, were really of value to the defendant. Whether the case supports the right of a seller to sue for the purchase price, on the buyer's refusal of title, depends on one's answer to the question whether the defendant received anything of value other than the title.

On the other hand, a number of cases have held distinctly and positively that a seller can not, by thrusting title upon the buyer or otherwise create in himself a legal right to the whole price, but that he is limited to the amount of his damage. This was discussed at length in *Acme Food Co.* v. *Older.*[32] The defendant had contracted to buy of plaintiff three tons of a certain prepared poultry food. The plaintiff set aside a proper amount for the defendant, but before he could ship it to the defendant—which would, under the established rules, have passed title to him—defendant repudiated his agreement. Plaintiff shipped, nevertheless, but too late then, it was held, to pass title. He sued for the whole agreed price but was limited to the difference between that amount and the market value of goods, that is, to his damage suffered. The court said, "It is sometimes said that the vendor in an executory contract of sale has, on the refusal of the vendee to accept the property, an election as to whether he will treat it as his own and sue for damages for the breach, or treat it as that of the purchaser and sue for the price. * * * The classification of cases made by the text writers, is, in some instances inaccurate. The writers seem not to have observed in all instances the distinctions and tests above mentioned. In other words they have frequently classed cases in which the title had

[32] 64 W. Va. 225. Accord, *Hallwood Cash Reg. Co.* v. *Lufkin,* 179 Mass. 143; *Dowagiac Mfg. Co.* v. *White Rock Co.,* 18 S. D. 105; *Meagher* v. *Cowing,* 149 Mich. 416, the lower court held that suit could not be maintained because title had not passed, the upper court reversed the decision on the ground that title had passed; *Barry* v. *Quimby,* 206 Mass. 259; *Atkinson* v. *Bell,* 8 Barn. & Cr. 277; *Gammage* v. *Texas,* 14 Tex. 413; *Funke* v. *Allen,* 54 Neb. 407, overruling a contrary opinion in *Lincoln Shoe Co.* v. *Sheldon,* 44 Neb. 249; *McCormick Harvesting Co.* v. *Balfany,* 78 Minn. 370; *Deere* v. *Gorman,* 9 Kan. Ap. 675; *Singer Mfg. Co.* v. *Cheney,* 21 Ky. L. R. 550; *Moody* v. *Brown,* 34 Me. 107; *Tufts* v. *Grewer,* 83 Me. 407; *Jones* v. *Jennings,* 168 Pa. 493; *Girard* v. *Taggart,* 5 Serg. & R. (Pa.) 19, "Properly speaking, the seller can not recover the price, * * * he recovers damages for the breach of a contract which was entirely executory when it was broken."

passed, or in which there was evidence from which the jury might have found the fact, as cases in which it had not passed. In other instances they have failed to observe that the executory contract had become executed so as to pass the title before any renunciation was made by the vendee. Indeed, there are very few cases in which the seller has been allowed to recover the purchase price when the title to the property had not passed to the buyer. The doctrine of election when the title has not passed, seems to have grown out of an unfortunate and inaccurate interpretation of certain cases made by Mr. Sedgwick in his work on Damages." In another case,[33] while the action was for damages, the court said in the course of its opinion, "To allow the seller to recover the full purchase price of an article, and compel the buyer to accept it whether he wants it or not, is to grant specific performance of a contract for the sale of personal property in favor of the seller, when no such relief could or would be granted in favor of the buyer. This is against the well established doctrines of courts of equity."

This criticism, that suit for the price would give the seller a remedy not reciprocally available to the buyer, seems to be the only practical objection to allowing the seller to thrust title upon the buyer and to sue for the price as a debt. This and, perhaps, the suggestion of Mr. Justice HOLMES that a party does not contract to do the specific thing named in the agreement, but to do that thing *or* to pay the other party a money compensation for not doing it. To allow the seller practical specific performance would be to ignore the buyer's alternative. Aside from these possible objections, there seems to be no reason why the courts should not slip a cog, as it were, in the purely logical progress of their judicial processes and allow the seller his action in debt. But the fact stands that when all the decisions are cancelled against one another, the ultimate result is opposed to such right in the seller.

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[33] *Manhattan City Ry.* v. *General Elec. Co.*, 226 Fed. 173.